BEFORE THE
BOARD OF DIRECTORS OF
MONTAGUE CHARTER ACADEMY

In the Matter of the Accusation Against: Raul Rodriguez, et al., Respondents.	OAH Case No. 2011040014

PROPOSED DECISION

The hearing in the above-captioned matter was held on April 19, 2011, at Pacoima, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Complainant was represented by Sarah J. Kollman, Middleton, Young & Minney. Respondents Raul Rodriguez and Griselda Duenas were the only Respondents who appeared, and they represented themselves.

Oral and documentary evidence was received at the hearing, the case was argued, and the matter submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follow.

FACTUAL FINDINGS

1. Complainant Gerard Montero filed the accusations[1] in this proceeding in his official capacity as Interim Principal of Montague Charter Academy (Academy).

2. The following persons are certificated employees of the Academy, and are hereafter referred to as Respondents:

Raul Rodriguez, Antonio Sanchez, Jr., Cary Rabinowitz, Rosalilia Garcia, Michael Basalone, Elizabeth Alvarez, Luis Chavez, and Griselda Duenas.

[1] The term "accusation" refers to a type of pleading utilized under the Administrative Procedure Act, Government Code sections 11500 and 11503, which provides the procedural framework for hearings of this type. It should be made clear that the Respondents are not "accused" in the every-day sense of that word; they have done nothing wrong. Instead, it might be said that they are accused of not having enough seniority or qualifications to retain their positions with the Academy in the face of a resolution to reduce positions.

3. (A) On March 14, 2011, the Governing Board of the Academy (Board) adopted resolution number 10-11, entitled "Reduction or Elimination of Certain Certificated Services" (Reduction Resolution). (Ex. CS-1.) The purpose of the Reduction Resolution was to reduce and discontinue particular kinds of certificated services no later than the beginning of the 2011-2012 school year. Specifically, the resolution requires the reductions of 11 "FTE"—Full Time Equivalents—by reducing 11 FTE of elementary teaching services.

(B) Although it is a charter school, and not a school district, the Academy, through its Board, has deemed that pertinent sections of the Education Code shall govern lay offs of certificated employees.

4. The services which the Board seeks to discontinue or reduce are particular kinds of services that may be reduced or discontinued under Education Code section 44955.[2]

5. The decision by the Board to reduce or discontinue services was neither arbitrary nor capricious, but rather was a proper exercise of the Board's discretion given uncertainty regarding the state budget and the Academy's financial resources.

6. The reduction and discontinuation of services is related to the welfare of the Academy and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Board.

7. (A) On or about March 15, 2010, each Respondent was given written notice that pursuant to Education Code sections 44949 and 44955, their services would not be required in the 2011-2012 school year (hereafter the preliminary notices). Thereafter, Respondents requested a hearing, and each was served with an Accusation.[3] Each Respondent filed a notice of defense.

(B) Since the process began, the District was able to withdraw or rescind three preliminary notices. The Respondents are those employees remaining in the case after such rescissions.

8. In the course of the reduction in force process, the Academy created a seniority list. That seniority list took into account a number of factors, the primary factor being each certificated employee's first date of paid service.

9. Some of the Respondents shared a common seniority date, which required tie-breaking. Ties were resolved pursuant to the formula set out in the contract by

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[2] All further statutory references are to the Education Code.

[3] The accusations were served on either April 4 or 6, 2011. (Ex. CS-5.)

which the Respondents and other teachers are employed, which is the same contract used by the Los Angeles Unified School District and the United Teachers of Los Angeles. That process uses the last four digits of each teacher's social security number, with the lowest number having the most seniority within a group.

10. (A) Respondent Raul Rodrigeuz is shown as a probationary teacher on the seniority list, with a seniority date of November 23, 2010, which qualifies him as a "prob II.." He asserts that he has worked at the school since 1997, and that he was hired as a long-term substitute in, and has worked full time, ever since then. He argues that he should be able to "tack" time that worked as a long-term substitute or temporary teacher.

(B) Complainant offered evidence to the effect that Respondent Rodriguez had performed much of his service under emergency or intern credentials, and that he did not obtain a clear credential until November 2010. Indeed, Respondent was issued 30-day emergency permits in 2004, 2005, 2006, 2007, 2008, and as late as 2010. He held internship credentials in 2009 and 2010, and received his preliminary multi-subject credential on November 23, 2010. One written contract was received in evidence, which identifies him as a "provisional" employee based on his intern credential. (See Ex. B.) Complainant asserts that under section 44911, Rodriguez could not earn credit toward tenure while he held an emergency or intern credential.

(C) Respondent's written contract is titled "Montague Charter Academy Offer of Contract Employment As A Provisional Teacher." It is dated July 2, 2007. It states, in part, that the contract is subject to the collective bargaining agreement between the Los Angeles Unified School District (LAUSD) and the United Teachers-Los Angeles, as well as rules and regulations of the Academy and state law. At paragraph 4 of the agreement, it states in part that "I understand that this offer is for a provisional contract, and service under an emergency permit does not count toward permanent status (tenure) . . . . " (See Ex. B.)

(D) As detailed below, Rodriguez remains a probationary teacher, regardless of his seniority date. As such, he can not be retained if permanent teachers are being laid off.

11. No Respondent was able to bump a junior teacher from a position from which the Respondent was certificated and competent to hold. The Academy did not skip any junior employees in the process of the reduction in force.

12. No certificated employee junior to any Respondent was retained by the District to render a service for which a Respondent was certificated and qualified to render.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 44949 and 44955, based on Factual Findings 1 through 9.

2. (A) A school district may reduce a particular kind of services (PKS) within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustee*s (1976) 64 Cal.App.3d 167, 178-179.) The Court of Appeal has made clear that a PKS reduction does not have to lead to less classrooms or classes; laying off some teachers amounts to a proper reduction. (*Zalec v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 853-85;. see also *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 631, 637 [reduction of classroom teaching can be a reduction of a PKS; as long as there is a change in the method of teaching or in a particular kind of service in teaching a particular subject; any amount in excess of the statutory minimum may be reduced]; *California Teachers Assn. v. Board of Trustees* (1982) 132 Cal.App.3d 32.)

(B) Because the Board of the Academy has deemed that the Education Code shall apply to this proceeding, it follows that the Academy may reduce PKS as set forth in the decisions cited above.

3. The services to be discontinued are particular kinds of services within the meaning of section 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949. This Conclusion is based on Factual Findings 3, 4, 5, and 6 and the foregoing authorities.

4. (A) A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or "bump" a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469.) At the same time, junior teachers may be given retention priority over senior teachers—may be "skipped" by a District in favor of a senior employee—if the junior teacher possesses superior skills or capabilities not possessed by their more senior colleagues. (*Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 399; *Santa Clara Federation of Teachers, Local 2393 v. Governing Bd. of Santa Clara Unified School Dist.* (1981) 116 Cal.App.3d 831.)

(B) No Respondent established that they had the right to bump a junior employee or that they should have been skipped, based on the foregoing rules, and Factual Findings 8 through 12.

5. (A) As noted in Factual Finding 10, Respondent Raul Rodriguez asserted that he should have a seniority date from at least 2005, because he asserted that he was working as a long-term substitute from that year forward.

(B) Respondent Rodriguez cited *Motevalli v. Los Angeles Unified School District*, (2004) 122 Cal.App.4th 97 (*Motevalli*), in support of his position. *Motevalli* is not a case pertaining to lay-off; instead, it arose out of a lawsuit brought by a teacher who had been terminated through non-reappointment. Ms. Montevalli, the teacher in question, then sued, asserting violations of her constitutional rights. In the course of the decision, the Court was required to examine her employment classification, and it examined numerous lay-off decisions that have grappled with the classification issue.

(C) It appears that Ms. Motevalli was employed on a contract substantially similar to Mr. Rodriguez's contract, as he was described as a provisional employee. The Court of Appeal held that she must be deemed a probationary employee, even if she was not accruing credit toward tenure because of her credential.

(D) Based on *Motevalli* and other case law, Respondent Rodriguez must be deemed a probationary employee since July 2, 2007, when his contract was executed. (Factual Finding 10 (C).) However, that does not end the analysis, as his first paid date of service in that probationary status has not been determined, and because his status as a probationary teacher leaves him exposed to lay off.

(E) Complainant rightly argued that Mr. Rodriguez did not attain any credit for tenure while he taught under emergency or intern credentials. (§ 44911; *California Teacher's Ass'n v. Vallejo City Unified School Dist*. (2007) 149 Cal.4th 135, 150-151.) Thus, he remains a probationary teacher, but with a relatively high seniority date, which must date to some time in 2007.

(F) In this proceeding, Rodriguez remains the most senior probationary teacher, senior to Ms. Alvarez and Ms. Duenas. (See Ex. CS-2, p. 6.) However, the Academy is also laying off five permanent employees—Garcia, Rabinowitz, Sanchez, Basalone, and Chavez. It is fundamental that a district must lay off probationary employees before it lays off permanent employees. (See § 44955, subd. (b).) While Rodriguez would have a higher seniority date than the Respondents who have permanent status, if he himself had reached tenured status, that is not the case. Therefore, while he is entitled to a seniority date from 2007, he is still subject to layoff.

5. (A) No junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render, based on Factual Findings 8 through 12, and Legal Conclusion 5.

6. The District may lay off the Respondents, in reverse order of seniority, in order to reduce services, based on all the foregoing.

ORDER

1. The Accusations are sustained.

2. Notice shall be given to Respondents that their services will not be required for the 2011-2012 school year because of the reduction and discontinuance of particular kinds of services. Specifically, the Academy may give such lay-off notices to the following certificated employees, in inverse order of seniority, the most junior first, and the most senior last:

Raul Rodriguez, Antonio Sanchez, Jr., Cary Rabinowitz, Rosalilia Garcia, Michael Basalone, Elizabeth Alvarez, Luis Chavez, and Griselda Duenas.

May ___2011

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings